APPELLATE CIVIL.

Before Edgley J.

ABDUL HAQUE

v.

TARABANNESSA.*

1936

Aug. 4.

Easement—Mokarrâri *lease-holders—Same landlord—Prescription for easement by one such lease-holder over the land of another such lease-holder.*

A *mokarrâri* lease-holder cannot acquire an easement by prescription over the land of another such lease-holder who holds under the same landlord.

Moni Chandra Chuckrabutty v. *Baikanta Nath Biswas* (1) applied.

SECOND APPEAL by the plaintiffs.

The facts of the case and arguments in the appeal appear sufficiently from the judgment.

Gopal Chandra Das and *Bhuban Mohan Shaha* for the appellants.

Abdul Hossain for the respondents.

Ramendra Mohan Majumdar for the Deputy Registrar.

EDGLEY J. In the suit, out of which this appeal arises, the plaintiffs sued the defendants for recovery of joint possession of an eight annas share in certain disputed land, and in the alternative, for a declaration of their right of easement over this land. The land in dispute consists of a narrow channel immediately to the north of a District Board road, which connects a *dôbâ*, belonging to the plaintiffs, situated immediately to the south of their homestead, with a *khâl* to the west of some land belonging to the principal defendants. Admittedly, the plaintiffs and

*Appeal from Appellate Decree No. 354 of 1935 of Amrita Lal Banerji, First Subordinate Judge of Tippera, dated September 28, 1934, modifying the decree of Mahammad Ashaqueuddin, Second Munsif of Brahmanbaria, dated August 19, 1933.

(1) (1902) 9 C. W. N. 856.

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the defendants are *mokarrâri* lease-holders under the same landlords. It would appear that their ancestors partitioned their property about 80 years ago and, as a result of this partition, the predecessors of the plaintiffs acquired an allotment to the east of the channel, whereas the allotment of the predecessors of the defendants fell to the north of the channel.

The learned Munsif held that the plaintiffs were entitled to a declaration of their right of easement over the disputed channel on the assumption that this right had originated in a lost grant. The learned Subordinate Judge, however, reversed this decision on two grounds: (*a*) that, having regard to certain observations made by Chatterjea J. in the case of *Madan Mohan Chakravarty* v. *Sashi Bhusan Mukherji* (1), the plaintiffs were unable to acquire any prescriptive right over the channel in question as against the defendants and (*b*) that the circumstances of the case indicated that no question could arise with regard to the presumption of any lost grant.

The findings of the learned Subordinate Judge show clearly that it was only after the construction of the District Board road, immediately to the south of the channel, that the plaintiffs began to use the channel in question as a passage for boats and this seems to have been due to the fact that, when the District Board road was constructed 40 or 45 years ago, this road blocked the access of the plaintiffs' boats to a water passage immediately to the south of the road, and it would appear that for sometime after the construction of the road the predecessors of the defendants allowed the predecessors of the plaintiffs to make use of the channel to the north of the District Board road as a passage for their boats. It would also appear that during this time the predecessors of the plaintiffs were merely licensees in respect of the use of the channel in question. In view, therefore, of the facts which have been found by the learned Subordinate Judge it would be impossible to hold that

(1) (1915) 19 C. W. N. 1211.

the right to use the channel to the north of the District Board road had any legal origin in a lost grant.

The next question, however, which arises for consideration is whether or not the plaintiffs can acquire the right to use this channel by prescription. The difficulty with regard to this point is that it is admitted that both the plaintiffs and the defendants are permanent lease-holders under the same landlords. If it could be held that the landlords, at the time when the leases were granted to the predecessors of the contending parties, had parted with all their rights over the demised land, there would be no difficulty, but, as pointed out by Jenkins J. in the case of *Kally Dass Ahiri* v. *Monmohini Dassee* (1),—

> A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest.

The views of Jenkins J. appear to have been accepted by the Judicial Committee of the Privy Council in the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (2). In that case the observations of their Lordships of the Judicial Committee are as follows :—

> Sir Robert Finlay, in his able argument for the respondents, contended that a *mokarrâri* lease is tantamount to a conveyance in fee simple, and that the lessee must therefore be treated as a purchaser within the meaning of the Limitation Act. But the distinction between the two transactions has been well pointed out by Jenkins J. in his judgment in the case of *Kally Dass Ahiri* v. *Monmohini Dassee* (1): "Because at the present day," says the learned Judge, "a conveyance in fee simple leaves nothing in the grantor, "it does not follow that a lease in perpetuity here has any such result "..... The law of this country does undoubtedly allow of a lease in "perpetuity .....A man who, being owner of land, grants a lease in "perpetuity carves a subordinate interest out of his own, and does not anni- "hilate his own interest. This result is to be inferred by the use of the word "*lease*, which implies an interest still remaining in the lessor".

The position, therefore, would be that the plaintiffs, in order to acquire a prescriptive right of easement over the land in suit, would have to acquire this prescriptive right against the property belonging to their landlords. It has, however, been definitely

(1) (1897) I. L. R. 24 Cal. 440, 447. (2) (1909) I. L. R. 36 Cal. 1003 ; L. R. 36 I.A. 148.

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held by Rampini and Pratt JJ. in the case of *Moni Chandra Chuckrabutty* v. *Baikunta Nath Biswas* (1):

> The general rule undoubtedly is.....that a tenant of land cannot acquire an easement by prescription in other land of his lessor.

In that case their Lordships said—

> A tenant is always a tenant and never an owner of the land. He always derives his rights from the lessor and as the latter cannot have the right of enjoyment of an easement as of right against himself, so neither can his tenant against him.

Having regard, therefore, to the view taken by the various authorities with regard to this point, it seems to me clear that the plaintiffs cannot acquire a right of easement over the disputed channel by virtue of prescription; and, having regard to the findings of the learned Subordinate Judge, it would be impossible to hold that the plaintiffs' right of easement can be attributed to any legal origin arising from a lost grant.

In these circumstances, the decision of the lower appellate Court appears to be correct. The judgment and decree of the lower appellate Court are, therefore, affirmed, and this appeal is dismissed with costs.

Appeal dismissed.

P. K. D.

(1) (1902) 9 C. W. N. 856, 859.